



Jun 27 2009
6:17PM

**THE CITY OF NEW YORK
LAW DEPARTMENT**

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June 27, 2009

By email

Hon. Shira A. Scheindlin
United States District Judge
Southern District of New York
500 Pearl Street, Room 1620
New York, New York 10007

Re: *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation,*
MDL No. 1358, Master File No. 1:00-1898 (SAS)
City of New York v. Amerada Hess, et al., 04 CV 3417 (SDNY)

Dear Judge Scheindlin:

During the discussion at the court conference on Thursday concerning the jury question at the end of Phase I of the trial, the City argued that it should not be required to prove that it would otherwise have funds to construct Station 6 and noted that the previous discussions concerning the 15 year time period to construct Station 6 assumed that the funds would be available. The pages from the transcript of the June 2, 2009 conference where the parties and Court discussed Phase I question and the availability of funds in the City's budget are attached as Exhibit A.

At Thursday's conference, the parties also discussed evidence of contaminants other than MTBE during Phase I. In this regard, we also note that at the June 2, 2009 conference, Mr. Sacripanti stated that ExxonMobil was not going argue in Phase I that other contaminants would cause the City not to construct Station 6. *See* June 2, 2009 Transcript at 75:18-76:11 (included in the pages attached as Exhibit A).

Respectfully yours,

Susan E.

Amron

Susan E. Amron

Deputy Chief

Environmental Law Division

Digitally signed by Susan E. Amron
DN: cn=Susan E. Amron, o=New York
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Date: 2009.06.27 17:00:05 -04'00'

c: Peter Sacripanti
Victor Sher

Exhibit A

1 962UMTBEC
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x
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3 IN RE: METHYL TERTIARY BUTYL 00 MDL 1358
3 ETHER ("MTBE") PRODUCTS Master File C.A.
4 LIABILITY LITIGATION No. 1:00-1898 (SAS)
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5 -----x
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6 June 2, 2009
6 5:40 p.m.
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7 Before:
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8 HON. SHIRA A. SCHEINDLIN
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9 District Judge
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10 APPEARANCES
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12 MICHAEL A. CARDOZO
12 Corporation Counsel of the
13 City of New York
13 Attorney for City Plaintiffs
14 BY: SUSAN E. AMRON
14 -and-
15 SHER LEFF LLP
15 BY: VICTOR M. SHER
16
16 GREENBERG GLUSKER
17 Attorneys for Plaintiffs
17 BY: ROBERT S. CHAPMAN
18
18 McDERMOTT, WILL & EMERY
19 Attorneys for Defendants Exxon Mobil Corp.
19 and Defendants' Liaison Counsel
20 PETER JOHN SACRIPANTI
20 JENNIFER KALNINS TEMPLE
21 WILLIAM STACK
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21 THE COURT: All that I am saying is, that is trying
22 the case. That is what Mr. Sher was doing too. I don't want
23 to argue who would win the point. I am trying to see if there
24 is a question to be framed. I am also trying to understand the
25 case in a way that I never have before. I don't quite

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1 understand what we are trying -- it is certainly atypical.
2 Every other case that I have, there is contamination to wells
3 that are supplying water, which was certainly Suffolk and which
4 was the one that I knew the best and spent time with, and then
5 the case that we worked on settlement, so a couple of cases
6 that I have most of the involvement with, I have contamination
7 of working wells. This is strange.

8 So even if we got the right question, phrased it
9 right, started with this question, can the City prove by a
10 preponderance of the evidence that there is a reasonable
11 probability that these wells will be used in the next X years,
12 even if we got that, I am sort of curious why we are doing this
13 in the summer of '09? What is the pressure to do this, other
14 than we have put a lot of time and effort in preparing the case
15 for trial? What is the time pressure for trial?

16 MR. SHER: The most obvious answer, I think, is that
17 the City needs a resolution, in theory anyway, of recovery so
18 that it can go forward with implementing its plan to bring
19 these wells into service.

20 THE COURT: Because recovered cash money from the
21 defendant that would help the budgeting of getting the work
22 done?

23 MR. SHER: Absolutely.

24 THE COURT: So that money could fund the project that
25 would get the backup system ready?

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1 MR. SACRIPANTI: I am sorry. Very pointed, very
2 direct questions were asked and it wasn't, we are waiting for
3 money; it was, it is not budgeted, it could --

4 THE COURT: It is not budgeted is that we are waiting
5 for money. That is the same.

6 MR. SACRIPANTI: I beg to differ. There is an issue,
7 your Honor, as to whether this entire system will ever be used.

8 THE COURT: I think you are missing that point. If we
9 had unlimited moneys in the City of New York and we didn't have
10 to choose between budget priorities, from what I am hearing,
11 that if there were unlimited money, if a miracle happened and
12 we didn't have to make choices and we could have all of the
13 policemen and firemen we wanted and sanitation men and
14 everything else, I guess that the City would work on this
15 system.

16 MR. SACRIPANTI: I would like to know what witnesses
17 those are because we have --

18 THE COURT: Maybe there is such a witness because what
19 they have said, I think, is that the budget may not allow it.
20 That is a budgetary concern. That's why I said, in the perfect
21 world, if there were all the money in the world in the budget
22 and nobody had to make choices between the way that money is
23 spent --

24 MR. SACRIPANTI: The testimony is: (A) It is not
25 budgeted; (B) There has not been a final decision to move

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2 forward with this, and it is unrelated to the budget.
3 THE COURT: Then you will win the point.
4 MR. SACRIPANTI: Yes. I don't want to be adversarial,
5 but the point is, I think this is a very serious first step.
6 THE COURT:
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19 THE COURT: What was the X date?

20 MR. STACK: It depends on how you want to slice and
21 dice it. The bottom line is, there is time built into that
22 schedule to make the decision. But if you talk about when you
23 make the decision to the point where you actually are going to
24 bring it online, that is four to six years.

25 THE COURT: Once you have made the decision, you

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1 believe the evidence shows it can be accomplished in four to
2 six years?

3 MR. STACK: That's what Mr. Meekin testified.

4 MR. SHER: I think it is actually a little longer,
5 your Honor.

6 THE COURT: What do you think it is, the decision?

7 MS. AMRON: Once the decision and the money is there?

8 THE COURT: Let's assume that the decision is made and
9 the money is there. Assume both of those, how long would the
10 work take?

11 MS. AMRON: There is the City's contracting process,
12 then the design, then the contracting process, then the
13 construction and then the start-up period. And all of that
14 together -- and this is the rough estimate based on what I
15 remember from the testimony -- is about seven to eight years
16 once the money is there if everything goes smoothly, if you
17 don't have to disqualify a contractor --

18 THE COURT: Then 10 would be safe.

19 MS. AMRON: When you are planning something that you
20 think will take seven to eight if everything goes smoothly, 10
21 from a trial before you had the money on hand, actually, that
22 has no buffer built into it because it doesn't account for the
23 trial time, but it also doesn't account for the problems of
24 disqualifying a contractor or having something take longer than
25 expected.

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1 THE COURT: It is an arbitrary number, but it has to
2 be fair to everybody. I am just going to say 15 and be done
3 with it. And that's a question that I would ask the jury, and
4 the witnesses would have to be prepared to prove it. That's
5 the first phase.

6 Now I think that we do need to turn to the question
7 that Mr. Sher has begun to ask, what evidence would I allow in
8 this first phase? What has to be in this first phase?

9 MR. SHER: This is where the chart that I gave your
10 Honor at the beginning is actually helpful. I think that the
11 answer to that question, first of all, I think it has to
12 include the defense contention that the problems with our water
13 system are not MTBE at Station 6, and we have to be able to
14 rebut that.

15 THE COURT: I don't understand why.

16 MR. SHER: How can the jury determine the
17 reasonableness of the City's conduct without understanding what
18 the problem is and what the City's response needs to be.

19 THE COURT: I am not following you at all. The first
20 issue is whether that is really going to be the backup system
21 that the City is going to implement.

22 MR. SHER: But the defendants claim, and you heard it
23 earlier today, that in fact this is a crummy water system that
24 the City, according to the defendants, was ordered to purchase
25 and not use, and doesn't the jury have to understand what the

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1 nature of the problem is that the City wants to solve to bring
2 it online?

3 THE COURT: No. I think that the very first step is
4 just proving that this is your first choice backup system.
5 This is where you want, if all the stars are right, that is, if
6 the money is there -- and I forgot the other one. The money is
7 the big one. Money and something, I thought --

8 MR. SHER: Money is the big one.

9 THE COURT: Assuming the money is there, is this the
10 way that you are going? And the defense, I thought, disputed
11 that, quite significantly. I thought they said there was no
12 proof at all that this was the backup plan of choice,
13 originally, the tunnels -- I don't know what other choices
14 there were, but I don't think that they think that you have the
15 proof.

16 MR. SHER: I understand that they think that, and I am
17 comfortable meeting that issue.

18 Do they get to argue, for example, that the real
19 problem is PCE, and that's the reason that the City won't be
20 bringing the system online?

21 THE COURT: That is different. They can say that the
22 reason you can't show that this is the backup plan of choice is
23 because it is contaminated PCE. Of course you can say that is
24 silly, our biggest problem or an equal problem is that it is
25 contaminated with their product and that's one of the things

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1 that is in the way.

2 MR. SHER: Once that happens, and I would be
3 interested in their view on what they intend to prove during
4 that phase, but once they do that we have to get into all of
5 those issues I have listed here of the world of MTBE and
6 sources and the severity and the extent of the contamination
7 because that's how we rebut the contention that it is really
8 PCE and not MTBE.

9 THE COURT: It is not that it is really PCE, but that
10 it is not the No. 1 first choice backup plan because this water
11 is contaminated with PCE.

12 MR. SACRIPANTI: What we are going to say, ladies and
13 gentlemen of the jury, if you believe that they will never turn
14 the system on and ever use this --

15 THE COURT: We have to go back. We are not there. We
16 are at that very question. You want to argue to the jury, we
17 will learn that this is not the City's backup plan, not their
18 first choice backup because this water is contaminated with
19 PCE.

20 MR. SACRIPANTI: I hear the question and I will
21 respond in 10 seconds.

22 THE COURT: Good.

23 MR. SACRIPANTI: I don't think that we need to at that
24 stage say that. I think that the evidence is for us pretty
25 clear that the City is way up in the air as to what it is going

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1 to do and won't say for certain because they don't know for
2 certain what they are going to do.

3 THE COURT: So you are not going to say, the reason
4 this is not the number 1 backup plan and the City can't prove
5 that to you is because this water is very contaminated with
6 PCE, so they are never going to start with this water.

7 MR. SACRIPANTI: On the damages phase --

8 THE COURT: That's different.

9 So, Mr. Sher, they are not going to contest this is
10 the number 1 backup plan by saying the water is bad water
11 because they have PCE.

12 MR. SACRIPANTI: Could I make a suggestion?

13 THE COURT: Yes.

14 MR. SACRIPANTI: I think if the Court has made a
15 ruling that this is the first issue to try --

16 THE COURT: Ruling is too strong. We are all thinking
17 out loud.

18 Go ahead.

19 MR. SACRIPANTI: The only thing that I was going to
20 suggest, and I don't want to speak for the plaintiffs, but I
21 know I would benefit by thinking through a number of these
22 issues and not on the fly as we are doing it.

23 THE COURT: But Mr. Sher who has traveled across the
24 country and has thought about it and prepared this chart and
25 what he has to prove even to answer the question, but he

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1 phrased the question wrong. He says that the question, the
2 City will never use this well and that is not because of MTBE.
3 It is not related to MTBE or not MTBE. You are just saying it
4 is a failure of proof that this is the plan, if they can't
5 prove that this is the backup plan that has been adopted and
6 would like to be executed if the money is there.

7 MR. SACRIPANTI: I think that's right.

8 THE COURT: If that is the case, then it is a narrow
9 issue, very narrow and it would need some of the things that he
10 wrote down. It would have to explain the City water system,
11 the need for water from Queens, contingency planning for water
12 from Queens, the City's alleged plan to bring Station 6 -- and
13 I would drop "and other wells" -- online, and then I probably
14 would quit. Everything else in his box is a distraction on
15 that question.

16 MR. SACRIPANTI: I would agree with that.

17 THE COURT: So you basically would be defending
18 through cross-examination. I am not sure that you would be
19 calling any witnesses.

20 MR. SACRIPANTI: I have been thinking on my feet,
21 which I get paid to do, but this is --

22 THE COURT: -- scary?

23 MR. SACRIPANTI: -- scary right now because I think
24 that is right.

25 THE COURT: You don't want to commit to that. I

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1 understand. You might have a witness to call on proof of
2 alternative plans, such as tunnels and things like that, and
3 somebody that they don't want to call who you think would be
4 helpful that this is nowhere near the real backup plan and then
5 put it to the jury and see what they say -- not they will
6 surprise you and say, we find for the plaintiff and the
7 plaintiff has proved by a preponderance of the evidence that it
8 is reasonably probable this is coming online within the next 15
9 years, we have to be ready to go to step 2.

10 And the next question that we want to try and that
11 question, of course, now has to involve MTBE. Let's play it
12 out. Let's say, for example, the jury says yes, it is
13 reasonably probable it is coming online, it is going to be
14 ready with a backup system.

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